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RIDPEST SDN BHD v. BUG BUSTER SPECIALISTS SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
ROSNAINI SAUB J
[CIVIL SUIT NO: 22NCVC-319-06-2015]
B 24 APRIL 2018

CONTRACT: *Agreement – Franchise agreement – Illegality – Collection of royalty fee and marketing fund – Whether franchisor could allow agent to collect royalty fee and marketing fund from franchisee – Whether marketing fund misused by*
C *franchisor – Whether allegations against franchisor baseless – Whether franchisor's claim for arrears in royalty and marketing fund allowed – Whether issue of illegality raised by franchisees an afterthought – Franchise Act 1998, ss. 6 & 22*

CONTRACT: *Agreement – Franchise agreement – Implied term – Whether agreement silent on franchisor's entitlement to take over service contracts between*
D *franchisee and end-customers – Whether an implied term in contract – Whether such a term ought to have been expressly inserted into agreement – Service contracts entered into between franchisee and end-customers – Whether franchisor privy to such contract – Franchisee collected full payment from end-customers – Whether franchisor ought to be reimbursed by franchisee – Whether franchisor entitled to*
E *make claim for advanced payment for undone and outstanding services*

CONTRACT: *Agreement – Franchise agreement – Breach – Allegation of – Whether franchisee acted in breach of contract – Prohibition of carrying out business in competition with franchisor for period of two years – Whether franchisee*
F *continued with same business under another company name – Whether franchisee committed act of passing off or infringement of franchisor's brand – Franchise Act 1998, s. 27(1)*

CONTRACT: *Agreement – Franchise agreement – Liability – Guarantors – Whether guarantors for franchisee liable to pay franchisor arrears of royalty fee and*
G *marketing fund*

CONTRACT: *Agreement – Franchise agreement – Counterclaim by franchisee – Whether franchise agreement valid and enforceable – Whether franchise agreement wrongfully terminated – Whether franchisee could rely on s. 34(3) of Franchise Act 1998 to insist on franchisor renewing franchise agreement based on favourable terms*
H *and conditions – Whether franchisee's counterclaim ought to be dismissed*

The disputes between the parties arose out of the franchise agreement ('the FA') entered into between the plaintiff as franchisor of a pest control system known by the brand name 'Ridpest' and the first defendant as franchisee. Under the FA, the plaintiff granted a franchise of Ridpest to the first

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defendant for a period of five years, which included not only the use of the brand name Ridpest but also included the use of computer data programme system and intellect property of the franchise. The second and third defendants were directors and shareholders of the first defendant and were guarantors for the first defendant in respect of the FA. The nature of the franchise business was such that the first defendant would enter into a service contract with the end-customers and the first defendant would bill and collect payment upfront from the end-customers under the said service contract. Subsequently, after giving the first defendant the shortest of notice, the plaintiff entered into the first defendant's office premise and collected and retrieved all the data from the first defendant's computer relating to the franchise business and thereafter erased the database from the first defendant's computer, effectively ending the first defendant's franchise business. The plaintiff's claim against the first, second and third defendants under the FA were (i) the plaintiff's stand was that upon the expiry of the FA with the first defendant, the undone and outstanding services to the end-customers would be taken over by the plaintiff. However, since the first defendant had already collected payment in full from the end customers, the plaintiff submitted it ought to be reimbursed and be paid by the first defendant. According to the plaintiff, the total amount outstanding and due from the first defendant in respect of this 'advanced payment for undone or outstanding services' was RM697,317.67. As there was no express provision under the FA pertaining for reimbursement of 'advanced payment for undone or outstanding services', the plaintiff was relying on the application of implied term to make this claim; (ii) for arrears in royalty and marketing fund amounting to RM27,434.58; and (iii) the alleged breach of the first defendant of the FA whereby the first defendant had continued with the same business in the name of One Team Networks Sdn Bhd, thus the plaintiff suffered loss of profit. The defendants, on the other hand, absolutely denied that they were liable, or in any way indebted to the plaintiff of any amount whatsoever arising from the determination of the FA. The first defendant argued that (i) FA was null and void and unenforceable on the ground of illegality as at all material times, the royalty fee and marketing fund were paid to and collected by Ridpest Franchise Sdn Bhd, a separate and distinct entity from the plaintiff, thus contravening s. 6(1) of the Franchise Act 1998 ('Franchise Act') and that there was also a breach of s. 22(2) of the Franchise Act when the marketing fund collected by Ridpest Franchise Sdn Bhd were not placed by the plaintiff in a separate account; (ii) that there was no implied term of the FA relating to reimbursement of 'advanced payment for undone or outstanding services 'as averred by the plaintiff; (iii) that the first defendant did not owe any outstanding royalty and marketing fund payment to the plaintiff; and (iv) that the new franchise agreement offered to the first

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A defendant for extension in respect of the franchise business contained unreasonable and unfavourable terms. In the premises, the first defendant made a counterclaim against the plaintiff to declare that the FA was invalid and null and void, and claimed damages. As for the second and third defendants, the gist of their defence was that their liability under the B guarantee only arose if the first defendant was liable to the plaintiff.

Held (allowing plaintiff's claim for arrears of royalty fees and marketing fund; dismissing first defendant's counterclaim):

(1) Section 6 of the Franchise Act merely requires a franchise to be registered by the franchisor before he can operate the franchise C business or make an offer to sell the franchise. The fact that the franchise had been duly registered under the said Act by the plaintiff was not in dispute. Ridpest Franchise Sdn Bhd was merely collecting and receiving the royalty fee and marketing fund for and on behalf of the plaintiff. In other words, Ridpest Franchise Sdn Bhd was merely D an agent of the plaintiff. There is nothing in law that prohibits the plaintiff as franchisor to allow an agent to collect the royalty fee and marketing fund from the franchisee. (para 13)

(1)(a) There was no proof that the marketing fund had been misused by the plaintiff. Section 22 of the Franchise Act merely provide that the E marketing fund shall be managed under a separate account and to be used for promotional purpose of the product under the franchise. A 'separate account' here does not mean separate bank account and as long as the money for the marketing fund was used for promotional purpose, the provision of s. 22 of the said Act was deemed complied F with, irrespective that the fund was collected and paid to the agent. Further, the defendant's allegations that the plaintiff practised discrimination and had not acted in an honest and lawful manner was baseless and was without merit. The issue of illegality of the FA was therefore raised by the defendants merely as an afterthought. (paras 13, G 15 & 16)

(2) The FA was silent on whether the plaintiff was entitled to take over the service contracts between the first defendant and the end-customers, and thereafter to make a claim from the first defendant for reimbursement in carrying out and completing those service contracts. H When parties enter into a written contract, they should be presumed to have inserted all the requisite terms that were within their contemplation. A term can only be implied if such a term relates to something so obvious, or that such implication was necessary in order to give business efficacy to the contract. The FA's terms and I

conditions were quite exhaustive and if it was the intention of the parties that the first defendant was to hand over the undone or outstanding works under the service contract with its end customers to the plaintiff and thereafter reimburse the plaintiff, such a term would have been expressly inserted into the FA. There was no evidence before the court to show that this situation was even discussed before the signing of the FA. This situation did not pass the officious bystander test (*Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong*). Such a term was not so obvious so as it would be intended to be implied into the FA. (paras 18, 20 & 22)

(2)(a) The plaintiff had unilaterally and on its own without the first defendant's permission took over the first defendant's undone or outstanding services under the service contracts. The plaintiff thus should bear the risk of taking such an action and take the loss as it fell. Further, the service contract entered by the first defendant was between the first defendant and its end-customers. In law, the plaintiff was not privy to such contract and the plaintiff could not make a claim against the end-customers. The end-customers had already paid in advance and in full to the first defendant. Therefore, in the absence of an express term in the FA, the first defendant was under no obligation to hand over its end-customers to the plaintiff, and accordingly the plaintiff was not entitled to make the claim for the so-called 'advanced payment for undone or outstanding services.' (paras 23-25)

(3) The plaintiff's claim for arrears in royalty and marketing fund was based on the evidence of PW4 and the statement of account. The first defendant had not called witnesses of its own to challenge the statement of account. The second and third defendants had at this material time already resigned from the first defendant company and had admitted that they had no knowledge of events happening at the time of expiry of the FA. The summary of account and the evidence of PW4 remained unchallenged. Thus, the plaintiff's claim for the said sum of MR27,434.58 for arrears of royalty fee and marketing fund was allowed. (paras 31, 33 & 34)

(4) There was insufficient evidence to prove that the first defendant had acted in breach of cl. 18.2 of the FA or s. 27(1) of the Franchise Act, that is, the prohibition of carrying out business in competition with the plaintiff for a period of two years. After the FA was not extended, the first defendant had to face several angry and dissatisfied end-customers. One Team was merely assisting to attend to these customers since the first defendant was no longer able to continue its

franchise business after their computer database had been erased by the plaintiff. The mere fact that One Team had occasionally attended to the first defendant's end customers could not amount to sufficient evidence that the first defendant had breached cl. 18.2 of the FA or s. 27(1) of the Franchise Act. There was no clear evidence that the first defendant had committed the act of passing off or infringement of the plaintiff's franchise brand. (para 37)

(5) Based on the decision that this court had made on the plaintiff's claim against the first defendant, the second and third defendants were liable to pay the plaintiff the arrears of royalty fee and marketing fund. As for the first defendant's counterclaim, the FA was valid and enforceable and the issue of wrongful termination of the FA was misconceived. Further, the first defendant could not rely on s. 34(3) of the Franchise Act to insist on the plaintiff to offer a renewal franchise agreement based on the similar or not less favourable terms and conditions than of the original FA. As such, both the plaintiff and the first defendant were at liberty to negotiate new terms and conditions. The first defendant's counterclaim was therefore dismissed. (paras 39 & 41-43)

Case(s) referred to:

Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***

J Toomey Motors Limited & Toomey (Southend) Limited v. Chevrolet UK Limited [2017] EWHC 276 (Comm) ***(refd)***

Mohamad Fauzi Che Rus v. JR Joint Resources Holdings Sdn Bhd [2016] 6 CLJ 266 HC ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***

Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor [2015] 1 LNS 936 HC ***(dist)***

Legislation referred to:

Evidence Act 1950, s. 90A(2)

Franchise Act 1998, ss. 6(1), 15(1), 18(4), 20, 22(2), 27(1), 29, 34(1), (3)

For the plaintiff - Arun Kasi & Esther Ong; M/s Esther Ong Tengku Saiful & Sree

For the 1st defendant - Valerie Chong; M/s Valerie Chong & Co

For the 2nd & 3rd defendants - William Foo, Tan Li Min & Tan Yen Ning; M/s Foo Hiap Siong & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Rosnaini Saub J:

[1] The disputes between the parties in this case arise out of the franchise agreement dated 9 June 2007 (the FA') entered into between the plaintiff as franchisor and the first defendant as franchisee. The plaintiff is the franchisor of a pest control system that is known by the brand name 'Ridpest'. Under

the FA, the plaintiff granted a franchise of Ridpest to the first defendant for a period of five years commencing on 9 June 2007 to 8 June 2012. The granting of the franchise included not only the use of the brand name Ridpest but also included the use of computer data programme system and intellect property of the franchise. The second and third defendants at the material times were directors and shareholders of the first defendant and were guarantors for the first defendant in respect of the FA. Towards this end, the second and third defendants have executed a guarantee and assumption of obligation dated 9 June 2007 (the guarantee').

[2] Under the FA, the first defendant was required to pay the plaintiff a royalty of 8% and a marketing fund of 3% of the sales made by the first defendant. These were to be paid twice a month. The first defendant, as franchisee, was also given the option of renewal of the FA for a successive term of five years. The nature of the franchise business was such that the first defendant would enter into a service contract with the end-customers and such service contract could be for a one-off single service or for a certain period of time; for example it could be for a year or two for periodic services throughout the said period. Usually, the first defendant would bill and collect payment upfront from the end-customers under the said service contract.

[3] Things appeared to be fine in the relationship of franchisor-franchisee between the two sides until up the expiry of the term of the FA, that is, until 8 June 2012. While waiting and negotiating for renewal of the already expired FA, the FA was extended twice; first to 31 July 2012 and later to 11 January 2013. In other words, the franchisor-franchisee relationship between the two sides continued until 11 January 2013.

[4] It appears that on 15 January 2013, after giving the first defendant the shortest of notice, the plaintiff through its agents and representatives, entered into the first defendant's office premise and collected and retrieved all the data from the first defendant's computer relating to the franchise business, including information relating to end-customers' contracts and service reports, and thereafter erased the database from the first defendant's computer. This effectively ended the first defendant's franchise business. And this was when disputes arose between the two sides that resulted in the filing of the present suit. The suit was originally filed at the Sessions Court but later was transferred to this court after the first defendant filed its counterclaim for an amount that exceeded the Sessions Court's jurisdiction.

[5] The plaintiff's claim against the first defendant as the former franchisee, and against the second and third defendants as guarantors, under the FA can be divided into three parts. The first and the most contentious of all is in respect of what is termed as reimbursement of 'advanced payment

for undone or outstanding services'. What this particular claim is all about is this. Given the nature of the franchise business between the two sides, the first defendant would as a matter of course, collect full payment from the end-customers in respect of the service contract. As I have alluded to, the service contract was for a certain specific period, of say, a year or two or may be even more, where the first defendant will provide the pest control or extermination service at periodic intervals. The problems arose when the FA expired but the first defendant still has undone or outstanding services under the service contract with end-customers. Remember that the first defendant has already collected in full from the end-customers the payment for these services. The question then arose as to what would be the fate of these service contracts? Who should perform and complete the outstanding services? The plaintiff's stand is that upon the expiry of the FA with the first defendant, the undone or outstanding services to the end-customers would be taken over by the plaintiff from the first defendant as the first defendant now can no longer use the franchise brand and business. The first defendant has to cease its business in respect of the franchise. It is the plaintiff's case that it has taken over all of the undone or outstanding services of the first defendant but, as I have said, the first defendant has already collected payment in full from the end-customers. The plaintiff therefore cannot collect any more payment from the end-customers. The plaintiff as such is saying that it should be reimbursed and be paid by the first defendant for such undone or outstanding services that the plaintiff has taken over. According to the plaintiff, from the database it has collected from the computer system, the total amount outstanding and due from the first defendant in respect of this 'advanced payment for undone or outstanding services' is RM697,317.67 as per para. 32(b) of the plaintiff's amended statement of claim. The problem here, or rather the issue here relating to this claim by the plaintiff is that there is no express provision under the FA pertaining for reimbursement of 'advanced payment for undone or outstanding services' but the plaintiff is relying on the application of implied term to make this claim.

[6] The second part of the plaintiff's claim is quite straightforward, that is, a claim for arrears in royalty and marketing fund amounting to RM27,434.58.

[7] The third part of the plaintiff's claim relates to the alleged breach by the first defendant of cl. 18.2 of the FA. Under the said clause of the FA, the first defendant is not allowed to compete or carry out a similar business as that of the franchisor for a period of two years upon the determination of the FA. It is the plaintiff's case that the first defendant in breach of this provision has continued with the same business in the name of One Team

Networks Sdn Bhd. The plaintiff therefore claims for loss of profit suffered as a result of this breach, the amount of which to be assessed by the Registrar of the Court.

[8] The defendants on the other hand absolutely deny that they are liable, or in any way indebted, to the plaintiff of any amount whatsoever arising from the determination of the FA. Firstly, the first defendant averred that the FA was null and void and unenforceable on the ground of illegality. The complaint here is that the plaintiff has failed to comply with the various provisions of the Franchise Act 1998 ('the Franchise Act') when entering into the FA with the first defendant. Secondly, the first defendant disputes that there is an implied term of the FA relating to reimbursement of 'advanced payment for undone or outstanding services' as averred by the plaintiff. Thirdly, the first defendant denies there is any amount at all outstanding in respect of such advanced payment for undone or outstanding services and dispute the calculation made by the plaintiff in respect of the said amount. The first defendant complains that the information and data obtained by the plaintiff that was used for the computation of the amount for the advanced payment collected was forcibly taken from the first defendant's database in the computer at the first defendant's office. The first defendant further averred that the plaintiff itself was uncertain as to the figure or amount it is claiming for this item. Fourthly, the first defendant denies owing any outstanding royalty and marketing fund payment to the plaintiff. Fifthly, the first defendant also complained that the new franchise agreement offered to the first defendant for extension in respect of the franchise business contained unreasonable and unfavourable terms. In the premises, the first defendant is making a counterclaim against the plaintiff to declare that the FA is invalid and null and void, and claim damages totalling RM1,155,149.72, or alternatively damages to be assessed by the court.

[9] As for the second and third defendants, the gist of their defence is that they are not liable because the first defendant is not liable to the plaintiff. In other words, their liability under the guarantee only arises if the first defendant is liable to the plaintiff. Essentially, they adopted the defence of the first defendant, including the defence of illegality of the FA as raised by the first defendant. It is also the second and third defendants' case that after the FA and the guarantee were executed, they have resigned as director of the first defendant on 1 May 2010 and 28 December 2007 respectively. Further, they also averred that there is another third guarantor under the guarantee that the plaintiff has not taken any action.

[10] At the trial the plaintiff called five witnesses and the defendants also called five witnesses. The pleadings are in bundle A. The common bundles of documents are in bundles B1 to B3, Cl to C3 and bundle 0. The plaintiff's additional bundles of documents are in bundles D1 to D12, while the

defendants' additional bundles of documents are in bundles El to E3. I have given due consideration to both the oral and documentary evidence before the court. I have also given due consideration of the lengthy submissions of learned counsel for both sides, including the case authorities cited.

The Issue Of Illegality Of The FA

[11] I would like to deal first with this issue of the illegality of the FA. This is because the illegality of the FA is the basis for both the defendants' defence against the plaintiff's claim and the first defendant's counterclaim against the plaintiff.

[12] The first contention of learned counsel for the defendants is that at all material times, the royalty fee and marketing fund were paid to, and collected by, Ridpest Franchise Sdn Bhd, which is a separate and distinct entity from the plaintiff. This arrangement is not disputed by the plaintiff. In fact, PW4 confirmed it. The argument is that since Ridpest Franchise Sdn Bhd is not the registered franchisor of the franchise, the FA is therefore tainted with illegality since it contravenes s. 6(1) of the Franchise Act. Further, it was contended that there was also a breach of s. 22(2) of the Franchise Act when the marketing fund collected by Ridpest Franchise Sdn Bhd were not placed by the plaintiff in a separate account.

[13] With respect, I am of the opinion that the submission of learned counsel for the defendants on this point is misconceived and without merit. I agree with learned counsel for the plaintiff that s. 6 of the Franchise Act merely requires a franchise to be registered by the franchisor before he can operate the franchise business or make an offer to sell the franchise. In our present case, the fact that the franchise has been duly registered under the said Act by the plaintiff is not in dispute. As stated by the plaintiff's witnesses, particularly PW4, Ridpest Franchise Sdn Bhd was merely collecting and receiving the royalty fee and marketing fund for and on behalf of the plaintiff. In other words, Ridpest Franchise Sdn Bhd was merely an agent of the plaintiff. The case of *Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor* [2015] 1 LNS 936 is not applicable to our present case. In that case, it is clear that a franchise agreement is deemed to be illegal and unenforceable when the franchisor failed to register the franchise. In our present case, it is not an issue of unregistered franchise. There is nothing in law that prohibits the plaintiff as franchisor to allow an agent to collect the royalty fee and marketing fund from the franchisee, ie, the first defendant. Further, there is no proof that the marketing fund has been misused by the plaintiff. Section 22 of the Franchise Act merely provide that the marketing fund shall be managed under a separate account and to be used for promotional purpose of the product under the franchise. A 'separate account' here does not mean a separate bank account, and as long as the money for the marketing fund is

used for promotional purpose, the provision of s. 22 of the said Act is deemed complied with, irrespective that the fund was collected and paid to the agent, Ridpest Franchise Sdn Bhd. In our present case, PW4 already explained and clarified the matter. The defendants have failed to prove that the fund collected was not used for promotional purpose.

[14] The defendants also contended that there was contravention of s. 15 of the Franchise Act when the plaintiff failed to make advance disclosure of the requisite documents, including the FA before the execution of the FA. The defendants also complained that there was no cooling off period as required by s. 18(4) of the said Act. However, the evidence showed that the disclosure documents were given to the first defendant on 19 May 2007 and the FA was executed on 9 June 2007. That was more than the 10 day period stated in s. 15(1) of the Franchise Act. Then cl. 16.1 of the FA clearly stipulates that there will be a cooling off period of seven working days during which the franchisee (the first defendant) has the option to rescind the FA. it is therefore obvious that the defendant's contention regarding disclosure and cooling-off period is without merit.

[15] There was also the allegation that the plaintiff practised discrimination in the charging of royalty fee and of supplying of goods, services and equipment and advertising services in contravention of s. 20 of the Franchise Act. It is also alleged that the plaintiff as franchisor has not acted in an honest and lawful manner contrary to s. 29 of the Franchise Act. I merely wish to say that I find these were baseless allegations without any clear proof. PW4 has explained that the plaintiff usually gave a lower rate of franchise fee to ex-employees who wish to carry out the franchise business. In my view, such practice cannot be deemed as discriminatory in nature.

[16] In the end, I think the issue of illegality of the FA was raised by the defendants merely as an afterthought. It is important to note that the first defendant has carried out the franchise business until the FA expired without any complaint. That was from 9 June 2007 to 8 June 2012 – a period of five years. The dispute only arose when the parties cannot agree to the extension of the FA.

The Implied Term

[17] The issue of implied term turns out, in my view, to be the most critical issue in this case. As I have alluded, the plaintiff's main and substantial claim against the defendants relates to what has been termed as 'advanced payment for undone or outstanding services'. To recap, it was the nature of the franchise business carried out by the first defendant that it would enter into a service contract with the end-customers and the services provided would be periodic in nature throughout the said time. This claim for 'advanced

payment for undone or outstanding services' refers to cases where the first defendant has collected full payment from the end-customers under the respective service contract but remain unfulfilled or undone after the FA has determined or expired. The plaintiff has therefore taken over these service contracts and continue to provide the outstanding services to the end-customers.

[18] It is common ground between the parties that there is no provision in the FA that caters for such a situation. In other words, the FA is silent on whether the plaintiff is entitled to take over the service contracts between the first defendant and the end-customers, and thereafter to make a claim from the first defendant for reimbursement in carrying out and completing those service contracts. The plaintiff's contention is that by way of implication they can, even though the FA is silent on this matter. Learned counsel for the plaintiff argued that there is a need to give business efficacy to the FA by way of inserting an implied term to allow the plaintiff to claim for those 'advanced payment for undone or outstanding services'. Otherwise, it is argued, the first defendant would be making unjust enrichment for keeping the full payment it has received from the end-customers but it has not completed the service under the service contract. The plaintiff would then have to suffer loss for carrying out the outstanding services. Learned counsel for the defendants on the other hand argued that there should be no such implied term to be inserted into the FA because it would be unjust to the defendants.

[19] Learned counsel for both sides have referred to several case authorities in support of their respective argument. I would like to refer to the case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503. Peh Swee Chin FCJ (as he was then) in his judgment make the following instructive observations:

> Implied terms are of three types. The first are those which the court infers from evidence that the parties to a contract must have intended to include in the contract though not expressly set out therein. The second are those that come about by operation of law, whilst the third are ones that are implied by reasonable custom and usage of any market or trade. The implied term contended for in this appeal belongs to the first type.
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> As for the first type of implied term aforesaid, two tests must be satisfied before a court could infer them. The first is subjective in nature, and it is that such a term to be implied must be "something so obvious that it goes without saying, so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provisions for it in the agreement, they would testily suppress him with a common 'Oh, of course'." The second test is that the implied term should be of

> a kind that will give business efficacy to the transaction of the contract of both parties. Business efficacy means that the desired result of the business in question.

The two tests referred to here are the officious bystander test and the business efficacy test. I would further say that implied term inevitably requires the court to consider the presumed intention of the parties at the time when they entered into the contract. In our present case, it can be no doubt that the plaintiff needs to establish the said implied term because its claim for such 'advanced payment for undone or outstanding services' is not stipulated or mentioned in the FA.

[20] After considering the evidence and the submission of learned counsel for the plaintiff, I understand the predicament faced by the plaintiff as the franchisor. The plaintiff would want to maintain the good name of the franchise and as such, there is a need to fulfil and complete the first defendant's outstanding services to the end-customers. The first defendant after 15 January 2013 no longer abled and allowed to use the franchise brand 'Ridpest' because from that date onwards the franchise has been terminated by the plaintiff. However, in my considered view, a term cannot simply be implied into a contract just because the plaintiff felt that it is reasonable or fair to do so. The court has to consider the facts and circumstances of the case. What is fair and reasonable to the plaintiff might not be fair to the defendants. The basic principle is that when parties entered into a written contract, they should be presumed to have inserted all the requisite terms that were within their contemplation. A term can only be implied if such a term relates to something so obvious, or that such implication is necessary in order to give business efficacy to the contract.

[21] Therefore the question here is this: can it be presumed that it is the parties' intention that after the FA or the franchisee-franchisor relationship ended, the undone or outstanding services of the first defendant would be taken over by the plaintiff? The plaintiff of course is saying that the answer is in the affirmative. It is being said that is what the nature of the franchise business all about. However, based on the circumstances of this case, I am not certain that the plaintiff is correct. My reasons are as follows.

[22] The FA's terms and conditions are quite exhaustive and if it was the intention of the parties that the first defendant is to hand over the undone or outstanding works under the service contract with its end-customers to the plaintiff and thereafter reimburse the plaintiff, such a term would have been expressly inserted into the FA. There is no evidence before the court to show that this situation was even discussed before the signing of the FA. I do not think the situation here pass the officious bystander test as explained by Peh

Swee Chin FCJ in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong (supra).* Such a term is not so obvious so as it would be intended to be implied into the FA.

[23] Further, I think it would have been different if at the end of the franchisee-franchisor relationship, the first defendant has willingly and/or voluntarily handed over its clients or end-customers to the plaintiff. Or if there was some sort of mutual arrangement or agreement between the two sides for the handing over of the first defendant's customers to the plaintiff. In such a situation, I think the plaintiff would then have a strong case in making a claim for the 'advanced payment for undone or outstanding services' against the first defendant. But in our present case, it is in evidence that the plaintiff has forcibly took and removed the first defendant's clientele database from the first defendant's computer system. This incident happened on 15 January 2013. This means that the plaintiff has unilaterally and on its own without the first defendant's permission, took over the first defendant's undone or outstanding services under the service contracts. In the circumstances, the plaintiff should bear the risk of taking such an action and take the loss as it falls.

[24] As I have alluded to, the other argument put forward by learned counsel for the plaintiff is that such an implied term is necessary to give business efficacy to the FA. Again, with respect, I am unable to agree. The service contract entered by the first defendant is between the first defendant and its end-customers. In law, the plaintiff is not privy to such contract and as correctly submitted by plaintiff's learned counsel, the plaintiff cannot and could not make a claim against the end-customers. In any case, the end-customers have already paid in advance and in full to the first defendant. However, having said that, there can be another scenario that could happen when the FA expired or when the franchisee-franchisor relationship between the first defendant and the plaintiff ended. The scenario is that first defendant is obliged to refund to the end-consumers part of the advanced payment it already received in respect of the undone services. The end-customers too would be entitled to claim such refund from the first defendant because the service contracts are between them and the first defendant. This scenario cannot be disregarded. In such a scenario, the plaintiff would then be at liberty to approach the end-customers to offer its services directly to them. My point here is that even without the implied term, the FA can still be given business efficacy. A term should not be implied into a detailed commercial contract merely because it appears fair, or merely because one considers that the parties would have agreed if it had been suggested to them – see *J Toomey Motors Limited & Toomey (Southend) Limited v. Chevrolet UK Limited* [2017] EWHC 276 (Comm) – Tap 24 of defendants' bundle of authorities.

[25] It is therefore my judgment that in the absence of an express term in the FA, the first defendant is under no obligation to hand-over its end-customers to the plaintiff, and accordingly the plaintiff is not entitled to make the claim for the so-called 'advanced payment for undone or outstanding services'. It also follows that the issue of unjust-enrichment on part of the first defendant does not arise. The plaintiff too is, in the circumstances, not obliged to take over the first defendant's undone or outstanding services under the service contract entered into by the first defendant. The plaintiff's claim for this particular item must therefore be dismissed.

The Quantum For The Undone Or Outstanding Services

[26] Just to be clear, I have already dismissed the plaintiff's claim for such undone or outstanding services. However, for completeness sake, I would like to touch briefly on the quantum of the claim.

[27] The amount of the plaintiff's claim for the undone or outstanding services is based on the data retrieved from the database of the first defendant's computer and it was carried out by the plaintiff's IT contractors, PW1 and PW2. This original data so retrieved was kept as per bundle D1. After being checked manually by PW5, the corrected data was kept in bundle D3 and bundle D3 is actually the one used by the plaintiff to make the present claim against the defendants for the undone or outstanding services. Bundle D2 is the current database to show the outstanding services taken over and being serviced by the plaintiff to the end-customers.

[28] Admittedly, the figure or the quantum of the claim has been changed a few times but I accepted the explanation given by PW5 regarding the matter. Even though the data was obtained by the plaintiff in a high-handed fashion, I nevertheless accept the evidence of PW1, PW2 and PW5 in respect of the quantification of the claim. As such, I accept that the total sum of undone services as per bundle D3 is RM620,832.85 (after deducting the royalty fee and marketing fund). However, the defendants questioned 63 items in bundle D3 and the 63 items amounted to a sum of RM53,241.58. After deducting the said sum of RM53,241.58, the total claim for the undone service is RM567,591.27.

[29] Learned counsel for the defendants also raise the argument that the data in bundles D1 to D3 should not be admitted as evidence because of non-compliance with s. 90A of the Evidence Act. It is argued that the plaintiff has failed to produce the requisite certificate in accordance with s. 90A(2) of the Evidence Act and has also failed to call the maker of the documents or person in charge of the management of the computer. The cases of *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6; [1997] 3 MLJ 1 and *Mohamad Fauzi Che Rus v. JR Joint Resources Holdings Sdn Bhd* [2016] 6 CLJ

266 were referred to. With respect, I think the calling of PW1 and PW2 is sufficient in this case to admit the data in bundles D1 to D3 as evidence. PW1 and PW2 are the IT technicians and programmers that extracted the data from the first defendant's computer. There is therefore no necessity to produce the certificate under s. 90A of the Evidence Act.

[30] Accordingly, if not for the decision that this court has made regarding the implied term issue, I would have allowed the plaintiff's claim for the undone or outstanding services taken over by the plaintiff from the first defendant in the sum of RM567,591.27.

Arrears In Royalty Fees And Marketing Fund

[31] The plaintiff is also claiming for arrears in royalty and marketing fund in the sum of RM27,434.58. This claim is based on the evidence of PW4 and the statement of account found at pp. 3 to 21 of bundle C1. The statement of account showed that the first defendant was in arrears from the month of October 2012 to January 2013.

[32] The defendants challenged the correctness and reliability of the statement of account. It is being contended that the statement of account is confusing and tainted with uncertainty. This is because the plaintiff is claiming for royalty and marketing fund for the whole month of January 2013 when the franchisee-franchisor relationship has ended on 15 January 2013.

[33] However, it is to be noted that, as pointed out by the plaintiff's learned counsel, the first defendant did not call witnesses of its own to challenge the statement of account. DW4 and DW5 (ie, the third and the second defendants respectively) at this material time has already resigned from the first defendant company and have admitted that they have no knowledge of events happening at the time of expiry of the FA. In fact, the second and third defendants even disassociated themselves with the first defendant after they have tendered their respective resignation. It is my considered view that the summary of account and the evidence of PW4 relating to the arrears in royalty and marketing fund remained unchallenged.

[34] In the premises, I am allowing the plaintiff's claim for the said sum of RM27,434.58 for arrears of royalty fee and marketing fund.

Unlawful Competition By First Defendant

[35] In respect of this claim, it is the plaintiff's case that the first defendant has continued to use the franchise brand Ridpest even after the determination of the FA and after the franchisee-franchisor relationship has ended on 15 January 2013. The first defendant is alleged to have carried out the same type of business that competed directly with the plaintiff's business in

contravention of s. 27(1) of the Franchise Act and cl. 18.2 of the FA. Accordingly, the plaintiff seeks, for an order for the first defendant to produce the account of profit made and for the court to assess damages to be paid to the plaintiff.

[36] The plaintiff alleged that immediately after the FA has expired, and while negotiations for extension of the franchise were ongoing, the first defendant has used a company known as One Team Networks Sdn Bhd (One Team') to take over its franchise business. One Team has continued to service the end-customers of the first defendant using the franchise brand Ridpest.

[37] On this claim, I merely want to say that I find insufficient evidence to prove that the first defendant has acted in breach of cl. 18.2 of the FA or s. 27(1) of the Franchise Act, that is, the prohibition of carrying out business in competition with the plaintiff for a period of two years. As explained by DW4, after the FA was not extended, and the relationship between the plaintiff and the first defendant has ended on 15 January 2013, the first defendant has to face several angry and dissatisfied end-customers. One Team was merely assisting to attend to these customers since the first defendant was no longer able to continue its franchise business after their computer database has been erased by the plaintiff. In my view, the mere fact that One Team has occasionally attended to the first defendant's end customers cannot amount to sufficient evidence that the first defendant has breached cl. 18(2) of the FA or s. 27(1) of the Franchise Act. It follows that there is no clear evidence that the first defendant has committed the act of passing-off or infringement of the plaintiff's franchise brand.

[38] In the premises, the plaintiff's claim for this item ought to also be dismissed.

Claim Against The Second And Third Defendants

[39] The plaintiff's claim against the second and third defendants is as guarantors under the guarantee. The liability of the second and third defendants will depend on the liability of the first defendant. Based on the decision that I have made on the plaintiff's claim against the first defendant, the second and third defendants are therefore liable to pay the plaintiff the sum of RM27,434.58 only, being the arrears of royalty fee and marketing fund payable to the plaintiff.

A **The First Defendant's Counterclaim**

[40] In this counterclaim, the first defendant claims for a sum of RM1,155,149.72, or alternatively damages to be assessed by the court against the plaintiff. As I have alluded to, the basis of the counterclaim is illegality of the FA. However, I have already ruled that the FA was valid and
B enforceable.

[41] Next, the first defendant averred that the FA was wrongly terminated. But as pointed out by learned counsel for the plaintiff, the FA actually has already expired on 8 June 2012 as the five year term has run out. However, the FA was extended to 31 July 2012 and later to 11 January 2013 as the
C parties were in the process of negotiating the renewal and extension of the franchise to be given to the first defendant. As such, I think the issue of wrongful termination of the FA is misconceived.

[42] Apart from that, the first defendant also contended that the plaintiff
D was wrong not to renew the FA. Section 34(1) of the Franchise Act stipulates that a franchisee may apply for extension of the franchise term by giving a written notice to the franchisor not less than six months prior to the expiration of the franchise term. The critical and operative words here are "six-month written notice prior to expiry" of the FA. I find in this case there
E is no proof that such six months written notice was given by the first defendant to the plaintiff. Having not done so, the first defendant therefore cannot rely on s. 34(3) of the Franchise Act to insist on the plaintiff to offer a renewal franchise agreement based on the similar or not less favourable terms and conditions than of the original FA. As such, both the plaintiff and the first defendant were at liberty to negotiate new terms and conditions. In
F other words, it will be a fresh franchise agreement and not so much a renewal of the original FA. The plaintiff was at liberty to set new terms and conditions, including terms and conditions the first defendant considered as unfavourable.

G **[43]** On this ground alone, it is sufficient to dismiss the first defendant's counterclaim.

Conclusion

[44] Based on my findings and reasons stated, it is the judgment of the court as follows:

H

(a) the plaintiff's claim against the first, second and third defendants is allowed only to the extent of the sum of RM27,434.58 being arrears of royalty fees and marketing fund;

(b) the first, second and third defendants to pay the said sum of
I RM27,434.58 to the plaintiff together with interest at the rate of 5% per annum calculated from the date of filing of the writ until full settlement;

(c) the first defendant's counterclaim is dismissed.

Costs

[45] Given that the plaintiff has only succeeded in its claim for arrears of royalty fee and marketing fund, I believe there should not be an order for any substantial costs in favour of the plaintiff. However, on the counterclaim, the plaintiff ought to be awarded a more substantial costs.

After taking into accounts the nature of the case, I make the following order as to costs:

(a) the first, second and third defendants to each pay costs of RM3,000 to the plaintiff in respect of the plaintiff's claim; and

(b) the first defendant to pay costs of RM10,000 to the plaintiff in respect of the counterclaim.

All costs subject to payment of the allocatur fees.

[46] Order accordingly.